

IN THE TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 1919 of 1989

IN THE MATTER OF an application
by the Federated Miscellaneous
Workers Union of Australia,
Tasmanian Branch for
interpretation of the
Miscellaneous Workers Award

re clause 7 - Domestic

PRESIDENT

HOBART, 28 July 1989

TRANSCRIPT OF PROCEEDINGS

(RESUMPTION)

PRESIDENT: If there are no changes to appearances already announced, Mr Fitzgerald ...

MR FITZGERALD: - Could I, just in respect to appearances, sincerely apologise to the Commission and to Mr O'Brien. Regrettably I did have this hearing at 10.30 in my diary at 'Lyndhurst'. There obviously has been some problem there. Unfortunately, while I acknowledge that the fax did arrive on my desk, but I haven't been at my office to receive those, so I do apologise for lateness.

PRESIDENT: Yes. That's all right, Mr Fitzgerald. I thank you for the courtesy, but I always think it's something of a bonus to have you with us. It's such a rarity that we're able to have the pleasure of your presence.

Mr Fitzgerald, I have authorised a resumption of this matter in view of the fact that I was contacted by telephone by Mr O'Brien who informed me that information had come into his possession that he felt bore directly on the outcome or, could have a direct bearing on the outcome, of the threshold objection taken by you and upon which the parties are awaiting my determination.

Mindful of section 20(4) of the Act - and I'll just refresh your memory. One might say that's the natural justice provision - the only way that I could allow Mr O'Brien to inform the Commission of this additional evidence was to, of course, relist the matter so that you too may be able to make some sort of an assessment of the value or otherwise of what it is Mr O'Brien wishes to put before the Commission.

So that is the reason why we're here ...

MR FITZGERALD:

Yes. Well ...

PRESIDENT:

... and in case, as is your occasional want, you wish to challenge my right to do so ...

MR FITZGERALD:

No. As you'd be aware, Mr President, and as would Mr O'Brien would be aware, I did, in fact, write to the Commission indicating my objection to reopening the matter on the basis that there ... on the bald assertion that there is some evidence with affects the threshold issue.

I'm of the view that there is an obligation, at least, to outline what information is. That's not been outlined to the Commission or to myself.

In that regard I understand that this matter has been opened to allow that to occur. But I would indicate that if it is matters which I need to take instructions on, I'll simply have to do that because I have no idea as to what the matter is.

Unfortunately, because of the shortness of hearing, council officers who have been instructing me in this matter, are not available this morning. Desirably, they would have been. I did inform them that the matter had been relisted, but they weren't available.

And for that reason, I can only indicate or forecast to Mr O'Brien that whatever the matter is he wished to raise, I may need to take some instructions on it.

And, if necessary, we may, in fact, on some subsequent occasion, be required to ... although it may be necessary, in fact, to educe further evidence in respect to the point which Mr O'Brien raises.

PRESIDENT:

Yes. Well ...

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PRESIDENT - FITZGERALD

MR FITZGERALD:

So, all I can do is wait and see what the point is at this stage.

PRESIDENT:

Yes. Well if that's the case. But just again, I wanted to ... in case this matter ever arises or similar cases arise in future, let me say this about reopening matters.

According to the best advice I have - and I have in mind in particular a judicial ruling by a member of the New South Wales Industrial Commission on this very point - that until such time as a commissioner sitting alone declares himself functus officio by reason of the fact that he has, in fact, issued a decision and there was nothing more for him to do, he is able ... or she is able to reopen matters in the appropriate circumstances.

MR FITZGERALD:

I don't in any way object to that advice. In fact, I have done some very basic research in the time when I knew this matter was going to proceed, and I understand that that is possible.

However, from a procedural point, I simply raise the issue that there is, I believe, some procedural obligation on Mr O'Brien to indicate - in outline form - what that matter is, and he has not done that, sir.

PRESIDENT:

Yes. Well now, Mr O'Brien, it's over to you.

MR O'BRIEN:

Thank you, Mr President.

And indeed, if there were any need for other powers to reopen the matter, that would be contained in section 21(2)(n) of the Act which empowers the Commission to:

"Generally give all such directions and do all such things as is necessary or expedient for the expeditious

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MR O'BRIEN:

and just hearing and
determination of that
matter."

If, indeed, we are able to produce information which was not available at the time the matter was heard, not being allowed to produce it now would put the matter in this position: that were we aggrieved by your decision, we would be in a position of asking for the right to put that in appeal proceedings. And there are specific rights as to the introduction in new evidence on appeal.

So what we would say, as to the general principle, is that - and I'm heartened by your reference to that decision - the Commission must advise itself fully. And in the circumstances, as we allege, the events which took place following the conclusion of the hearing of this matter and could not have been put before the Commission, if we can bring those matters before the Commission before the writing of a decision, then that ought to happen.

I would expect Mr Fitzgerald's organisation, if it found itself in the same circumstances, would seek to do the same thing in similar or other proceedings.

So we would say there's certainly ... with or without a decision on the matter, there's ample power under the Act to do so, and as a matter of justice, it ought to happen.

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MR O'BRIEN:

In relation to the matter which is raised, it's not, in our view, a trivial matter that we seek to put before the Commission; one which we believe goes to the very bona fides of the threshold argument which has been put by the Confederation of Industry.

You will recall that this matter was heard and concluded on 22 June 1989. Following that date there was certain occurrences which have been drawn to our attention by members of this organisation and other persons.

On or about 10 July, we are informed that the coordinator of the Kingborough Personal Care scheme, Ms Watson, contacted carers with an instruction that they attend a staff meeting on 13 July 1989.

Certain employees questioned - as we're given to understand it - their obligation to attend and were informed, either by Ms Watson or a Mr Lovell, who is the Deputy Council Clerk, that it was a very important meeting and that they must attend. ?

Now we were informed by members that at that meeting, carers attending the meeting were addressed by the Deputy Council Clerk, who introduced himself and proceeded to indicate that there were some gentlemen from another employee organisation, the Federated Municipal and Shire Council Employees' Union, who had requested the opportunity to speak to the staff.

As we understand it, in the view of the employees who contacted us, there was a recommendation that the people should give consideration to joining a union. The staff, according to our information, felt that they were being informed that this was the appropriate union. XX
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I think Mr Lovell attempted to cover himself in relation to these proceedings by saying 'Well, we don't

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MR O'BRIEN:

know whether you're employees or not, but I'll come back to that point later. He then introduced certain officers of the union who addressed the staff. And naturally that organisation, seeking to pursue its own interests, sought to persuade the people that it was appropriate that they join that organisation.

I stress that that organisation is not an organisation registered under the Tasmanian Industrial Relations Act. It's not a party to the Miscellaneous Workers Award. It has not been involved in these proceedings to date. It has not been in contact previously with the carers, nor with this organisation. I'm unaware as to whether it has been in contact with Mr Fitzgerald's organisation about this matter.

Our information is that the staff were urged, by one or other of the council officers who were presented that night, to make a decision then to join that organisation on that night. And that, indeed, a comment was made 'Well we only needed a certain number of members to topple the other union and we've achieved that now'.

Now what we find intriguing, Mr President, is this: if the council feels that these people aren't employees, why did they organise a meeting with the other organisation at all? If they didn't organise it, but merely facilitated it, why facilitate it whilst the very question of whether the people were employees - at their instigation - was being determined in these proceedings?

As the other organisation is not a party to the award, subject to proceedings, nor State registered, why make a recommendation that it's an appropriate organisation? Bearing in mind that the outcome of these proceedings might be that the award in question operates in relation to

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MR O'BRIEN:

the carers who we believe are employees. And indeed, if people aren't employees how could they properly be members of an organisation, if that's the view of the council?

Now I would we don't share the view the council. And we say the people are entitled to join an employee organisation and we don't seek to draw any negative finding as to the employee organisation in question. We believe they're being used in relation to this matter.

But we think that it raises serious questions as to the bona fides of the applicant. /// x y

Now I might say that subsequent to that meeting on 13 July we made contact with Mr Lovell, the Deputy Council Clerk, about this matter. Mr Lovell indicated to us that he had advised the carers that they should consider joining a union; that he was a member of a union; and it was a free country and people can join unions. We agree with all of those comments.

The thing that we discovered from our conversation which didn't relate to what took place at the meeting, but rather it was a discussion about the justification for the action, Mr Lovell said 'We are party to the Country Councils Award as are the MEU. The FMWU have have access to the carers and now the MEU have had it too.'

Now I think that raises this question, Mr President: is, in fact, what Mr Lovell seeking to do, to establish the grounds for regulation of this area by a federal award? Now if that's what he's doing, then let's have that on the record. But let's not play games in these proceedings about whether or not the people are employees.

If the people are employees then our

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MR O'BRIEN:

matter as to the interpretation of the award ought to proceed and other proceedings may well determine - if that's the way that the council wish to pursue the matter - whether another award might be intruded.

If this matter proceeds to conclusion and the Commission found that the Miscellaneous Workers Award didn't apply, well that way would be open to the council.

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MR O'BRIEN:

Even if the Commission determines that the Miscellaneous Workers Award applies, the council would still have rights to seek to change jurisdictions and we and the other employee organisation would have certain rights in relation to those proceedings.

But I think we are extremely concerned that because of the events, that this application by Mr Fitzgerald is not bona fide. It's an application which is being put perhaps as a delaying tactic while certain other steps can be taken. And we think that the carers are perhaps being put in a situation where that they don't believe they have a choice - or proper choice - as to the employee organisation to which they can belong.

Now having said that, sir, if Mr Fitzgerald wishes we can ... I can call Pauline Shelley to give evidence as to certain conversations that she has had. I propose to put those matters on the record. I might say that our advice from Mr Lovell is that he's quite prepared to give evidence about what took place at the meeting and subsequently and we would welcome the opportunity to question him if he so does.

But we think that these matters ought to be on the record, particularly, for example, as we have evidence produced by Ms Watson that the carers, apart from one, that she'd spoken to weren't interested in joining unions and didn't believe there should be award coverage.

We find it somewhat perplexing that on 13 July - according to our information - that the council was prepared to recommend that these people join unions and that in fact Ms Watson stressed that the employees should join and join that night and made a comment that they only need a

MR O'BRIEN:

certain number of people to join the union - that union - to topple the other union.

Now I think that in this day and age if people believe they can behave that way with impunity, and they can, then it's a sorry state of affairs in industrial relations.

I would hope that Mr Fitzgerald's organisation was totally unaware of these facts because it does, in my view, impugn the integrity of the submission that he's put, if it be that it's been impugned without his knowledge, then no slur applies to him, but rather to his membership.

PRESIDENT:

Yes, Mr Fitzgerald.

MR FITZGERALD:

Yes, Mr President, as I indicated, Mr O'Brien for whatever reason chose not to outline those matters to me earlier and they are in fact serious as he indicated. I would have thought it would have been possible for Mr O'Brien to at least give me a courtesy phone call to indicate 'I intend to raise this' and that would have allowed me then to seek some instructions.

It doesn't unfortunately, and for that reason I can't respond in any way specifically to Mr O'Brien's submission. But in any event I would simply say that the question which we raise on the threshold argument stands and falls on the facts which have been put before you previously, in that particularly relating to the control test which I indicated very strongly.

This matter, I don't believe, in any way affects the bona fides or the legal position in terms of whether there's a master-servant relationship.

The only other matter which I can comment on without getting instructions is that certainly there was in the evidence, I understand, an

MR FITZGERALD: opportunity afforded to Mr O'Brien's union to speak to the carers. Now that's all I can say at this time. I have no further instructions on this matter.

Regrettably it could have progressed more quickly if Mr O'Brien gave me the courtesy of indicating what he was raising. He chose not to do so. Regrettably I'm in a situation where I will have to seek specific instructions. For that reason I would ask a courtesy of the Commission if they could expedite transcript as to the specific matters which Mr O'Brien has raised today and I will seek to get instructions in response to those matters, sir.

PRESIDENT: Yes, but you say that notwithstanding the assertions or allegations made by Mr O'Brien - we only have his assertion in that regard although he's quite prepared to call evidence - your earlier threshold argument stands ...

MR FITZGERALD: Yes.

PRESIDENT: ... or falls on the argument. Would it not be somewhat weakened though, Mr Fitzgerald, if the assertions made this morning by Mr O'Brien are proven to be factual? Because it seems to me that if, on the one hand, those instructing you maintain that there is no employer-employee relationship and yet on the other, actively encourage - so it's said - these people to join the union, thereby creating in the minds of someone, at least an expectation that that union could do something for them, and as unions can only act for members, wouldn't that weaken your argument?

MR FITZGERALD: Well I simply say at this stage it is mere assertion. As I said ...

PRESIDENT: Yes, quite so.

MR FITZGERALD: ... I can't respond specifically to that without instructions. As I indicated I was aware in the evidence

MR FITZGERALD:

and I think Mr O'Brien could confirm this, you may also recall it, but to that extent our arguments weakened in that we allowed - or the council did allow - that opportunity to Mr O'Brien's union to in fact address those personal carers. So whether this matter ... it does not matter in my view that the fact is that we conceded quite ... during the evidence that in fact Mr O'Brien's union was afforded that opportunity.

Now if it is that another union was afforded the same opportunity then I think it either affects or weakens or strengthens the particular arguments which have been put.

PRESIDENT:

Except that it would be unusual I imagine for any employer body to facilitate ...

MR FITZGERALD:

Well I can only deny that.

PRESIDENT:

... membership of ... yes.

MR FITZGERALD:

There's no ... I have no instructions on it. It is assertion at this stage and I would simply reject that without ... at this point without having the opportunity to seek instructions.

PRESIDENT:

I understand that you'll obviously have to seek instructions. I take your point about the transcript. There wouldn't be very much of it so I'm sure that we can accommodate you in that regard.

It's a question of getting this matter on as soon as possible because I'm afraid I've got a very full calendar, but I take Mr O'Brien's point, which I think is an extremely valid one, in the event - shall we say in the unlikely event - that the scenario alluded to by Mr O'Brien was in fact the case - namely, that someone was trying to play for time in order that another organisation might be able to seek presumably to have these classifications - or appropriate classification - included

PRESIDENT:

in the federal award or something of that order, then this Commission would view that very seriously, and indeed I would put you on ... all parties on notice that I would in fact take the matter up with the President of the Australian Commission in any case.

MR FITZGERALD:

I understand and I didn't address that point. Certainly we can indicate that we have no instructions or part in that alleged process and certainly from my point of view I'm not in any way attempting to delay these proceedings by any form.

PRESIDENT: No, I understand that. Were I in your position, I'd be doing exactly the same.

I think you must now take back to your principals what has been put, and that raises just one more question. You've entered an appearance for the Confederation of Industries. Did I, at any stage, ask you if the Kingborough council is a member?

MR FITZGERALD: I can't recall. I know there was some debate on that question.

PRESIDENT: Because if they are not, then anything relating to the Kingborough council is quite superfluous. They have no right to be heard.

MR FITZGERALD: Well I can certainly indicate that they are a member of our organisation.

PRESIDENT: You're not just appearing as an agent in these proceedings, because I couldn't hear you.

MR FITZGERALD: Well the Kingborough are, in fact, a member. I can say that.

PRESIDENT: Well if they're a member, that's all right.

MR FITZGERALD: Yes.

PRESIDENT: But if they were just a person or a body that might be bound by an award, but not registered, then they would have no right to be heard in these proceedings.

MR FITZGERALD: I think from memory I did enter my appearance actually acting on behalf of the TCI from memory.

PRESIDENT: You did, indeed.

MR FITZGERALD: Yes.

PRESIDENT: And that's why I now ask you the

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PRESIDENT: question, if the Kingborough council is, in fact, a member?

MR FITZGERALD: Yes, I can certainly confirm that.

PRESIDENT: If not, then I would simply proceed to interpret the award.

MR FITZGERALD: Yes, I can certainly confirm that they are members.

PRESIDENT: Yes. Very well.

MR O'BRIEN: Can I just say that in relation to Mr Fitzgerald's complaint about notice. I received a copy of a fax directed to you, Mr President. I took it that that would be followed up at some time by direct contact, either from you or from Mr Fitzgerald.

I studied it to see whether it required an answer at that time. I took it that Mr Fitzgerald was seeking relief direct from you and I did not respond. Not because I wasn't prepared to, but because I felt that the protocol had been established by Mr Fitzgerald.

But had he bothered to ring, I certainly would have advised him of the detail of the matter.

I received that fax, I think, last Monday, from memory. It might have been Tuesday, I've had a busy week, but the detail ... the letter or fax that you received has been transmitted to me, and for that reason - it being placed in your hands - I didn't contact him, but had he contacted me at the same time as he'd contacted you, I certainly would have told him of our intentions today.

PRESIDENT: Yes.

MR FITZGERALD: Well if I could respond to that. I don't see any obligation on my part to contact Mr O'Brien. Mr O'Brien requested the reopening. I see some

MR FITZGERALD:

obligation on him to state the reasons for it. Simply that, sir.

PRESIDENT:

Yes. And I don't see that the Commission has any obligation. I've made it very clear, and I hope I don't have to go through all that again, that this Commission is not bound by the rules of evidence. If you want an order for inspection or discovery of documents, Mr Fitzgerald, you'd better go into another jurisdiction. You won't get it from me.

But, certainly, you are entitled at some stage to be made aware of what is going to be put against your client, and until such time as you are made aware of it, of course, you have no case to answer.

Now we've gone that far down the track this morning, you are now made aware, at least in broad outline, of what it is. You can either ignore it, or you can do something about it. I take it if you're going to do something about it.

I have no alternative but to adjourn these proceedings to allow you a reasonable opportunity ... just off record for a moment, please.

...

ASSOCIATE:

These proceedings are adjourned till Wednesday, 9 August at 11.30 a.m. at a venue to be advised.

HEARING ADJOURNED